ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Service	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Cable Telecommunications Association ("CATA") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in CS Docket No. 95-184 (Telecommunications Services Inside Wiring, Customer Premises Equipment). As an initial matter, CATA observes that this proceeding should more properly be designated a Notice of Inquiry. It is clear that the Commission, while raising a multitude of questions, does not have sufficient information to propose sufficiently specific regulations. In large measure the Commission seems driven by a desire to make symmetrical the regulations applicable to cable television systems and telephone companies based on the notion that the eventual convergence of these services will require that present regulations be "harmonized." To achieve symmetry, not a particularly useful goal in and of itself, the Commission has made few proposals but asked many questions. In CATA's view, asking every conceivable question about a subject may yield information, but is not likely to provide a record that can possibly result in the adoption of rules.

One of the few proposals in this proceeding is to move the demarcation point that defines a cable subscriber's premises. This proposal appears clearly to have been made at the behest of cable competitors who have been frustrated in their attempts to gain access to multiple dwelling unit (MDU) buildings or who are simply unwilling to pay to install their own wiring. CATA maintains that the Commission has no Congressional authority to re-define the concept of customer premises by moving the demarcation

point. Moreover, were the Commission to do so, the effect would be to confiscate a significant part of a cable system's distribution system and violate the Fifth Amendment's proscription against the taking of property without just compensation.

CATA argues further that moving the demarcation point would have the effect of reducing competition, the opposite result of what the Commission intends. Deprived of its ability to even reach a dwelling unit, a cable system would be unable to offer not only its traditional video services, but expanded broadband services such as telephony and data transfer. Instead of providing consumers with the ability to choose services from several providers, the Commission would be foreclosing competition entirely.

Competition can best be achieved by giving consumers a choice of services from more than one provider. CATA believes that the best way to accomplish this is for the Commission to urge the Congress to adopt a uniform access law insuring that competitors can gain access to MDU's. Without access, placement of the demarcation point is meaningless.

CATA recognizes that cable systems have varying policies with respect to permitting subscribers to install cable or re-wire their dwellings. In large measure, many cable systems have a justifiable concern over the cumulative RF leakage that might result from subscribers having unfettered access to the cable. Before the Commission proceeds further, it should determine the likelihood of RF leakage and the extent to which it might pose an interference threat to licensed radio services.

With respect to the Commission's inclination to regulate customer premises equipment, CATA points out that there already seems to be a thriving market in various

devices intended to be connected to cable systems and that regulation seems unnecessary. In any event, since the Commission has been charged by the Congress with assuring the availability of equipment used to access services provided by all multichannel video providers, it should defer its examination of the marketing of cable devices and treat this issue in the larger context as Congress has required.

Finally, CATA finds the Commission's suggestion that cable operators be required to sell inside wiring to subscribers before termination of service or even that there be a presumption that the subscriber already owns the wiring to be completely without justification. The Commission's only authority is to establish rules governing inside wiring after a voluntary termination of service. It has no authority whatsoever, regardless of what goal it seeks to promote, to give away a cable system's property, and there is certainly no record to support a presumption that a system's property belongs to another.

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COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

1. The Cable Telecommunications Association ("CATA"), hereby files comments in the above-captioned proceeding. CATA is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 66 million cable television households. CATA files these comments on behalf of its members who will be directly affected by the Commission's action.

Introduction

2. In large measure, the Notice in this proceeding is premature -- at least for the purpose of rulemaking. The Commission anticipates a competitive environment in which wired services, cable television companies and telephone companies, begin to offer like services to the public, and clearly, there is movement in this direction. However, when various competitive services will be offered, by what company, using what equipment is by no means settled. It is clear from the Commission's Notice that it does not possess any unique insight into these issues. The Notice contains few proposals, but is replete with theoretical questions. Indeed, in this relatively short Notice there are

more than 140 questions, many of which probably await further business and technical developments for useful answers. If ever a Notice should have been an Inquiry, rather than a Proposed Rulemaking, this is it. CATA submits that although the Notice in this proceeding is awash with theory, the Commission requires more before it can attempt rulemaking.

The Demarcation Point

3. The Commission's consideration of demarcation point and whether to move it are driven by the circumstances surrounding the complexities of wiring in multiple dwelling units (MDUs). The Commission's only authority in this area stems from the Cable Act of 1992 which instructed the commission to adopt rules regarding the disposition of wiring 'within the premises of the subscriber' upon voluntary termination of service by the subscriber. The demarcation point defines that portion of the cable plant that a given subscriber may either buy or have removed - in other words the cable in each subscriber's premises. That telephone wiring is associated with a different demarcation point seems largely of historical significance and driven by other concerns. For purposes of cable regulation the only legal significance of the demarcation point is for purposes of voluntary termination of service. If the Commission is to move the demarcation point it can only be in this context. It has chosen a point twelve inches from a subscriber's premises. It could logically move the demarcation point some degree in an effort to better define premises, (for instance, the Commission could just as defensibly have placed the demarcation point immediately inside the premises) but

there is no legal justification for moving it, in the case of a MDU, to the basement of a building so that cable and telephone demarcation points might be "harmonized."

The Effort To Achieve Competition

4. It is clearly the Commission's intent to facilitate competition between cable systems and other MVPDs. In single dwelling units there is no significant problem. A home owner may choose to have multiple wires from different competitors entering the home. In an MDU there is more of a problem because of the cost of wiring a building, the placement of cables in common areas, and the concerns, if not whims, of building owners who sit astride the process in a form of *in loco parentis* for the residents of the building. The Commission's concept of competition appears to be aimed at moving the demarcation point to an area away from the subscriber's premises, to a spot that permits a competitor access to the subscriber's wiring without duplicating existing wiring. In other words, the Commission envisions giving another MVPD access to existing cable within a building. As we argue above, unless the Commission is willing to define one's premises as including hallways, stairwells and elevator shafts, it cannot legally move the demarcation point, which is defined only in terms of a subscriber's premises. It cannot move the demarcation point simply to facilitate competition.

5. There is also clear indication that Congress, in the Telecommunications Act of 1996, does not believe that true competition will be realized by competitors fighting

over or even sharing one wire. In the context of joint ventures between local exchange carriers and cable television systems, Section 652 of the Act states:

> ... a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.

This provision is significant. Use of the cable system's facilities must be with the concurrence of the operator and it must be limited in scope and duration. Clearly, it can not be because the Commission has created a new right by moving the demarcation point. The Congress has expressed a clear preference for achieving competition through the use of two wires, not one. Whatever short term advantages may be possible from a local exchange carrier's use of a cable operator's final wires, the Congress clearly does not want such a situation to persist -- and does not want it to exist at all without the cable operator's agreement.

6. As the Commission admits, at the present time it is not technically practicable for MVPDs to share a cable. Thus, for the Commission, competition means only a choice between providers. But such a view is short-sighted. If the cable operator's wiring is taken over by another MVPD, then the cable operator loses the ability to sell <u>all</u> services to that subscriber. Under this concept, competition is an "either, or" proposition. Real competition can only be achieved if multiple providers offer their own wires to consumers. Thus, a subscriber would be able to choose, for

instance, telephony and data services from one competitor and video services from another. In this situation neither competitor is foreclosed from offering diverse services and competition will be meaningful. If, as the Commission apparently believes, it is good for consumers to have broadband systems offering competitive services, then it is mystifying that the Commission would even contemplate permitting another broadband company to deprive cable systems of the very mechanism necessary to compete.

The Real Effect Of Moving The Demarcation Point

7. The Commission's intentions are clear. In its Order in MM Docket No. 92-260, it created a scripted scenario in which a competitor may make a telephone call to a cable system on behalf of a subscriber and terminate cable service. Unless during that conversation a cable employee says precisely the right things and immediately, without the opportunity to call back after checking, quotes the price of the wiring in the particular premises, the wiring will be deemed confiscated and the competitor entitled to its immediate use. In this Kafkaesque drama the Commission anticipates that the competitor will pay for the cable wiring on the subscriber's behalf.[1] Now the Commission proposes to move the demarcation point, incorporating in the confiscated wiring the portion of the cable operator's distribution plant necessary to provide the

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[1] It is noted that while the Commission's proposed rules would permit a competitor to acquire use, and even ownership, of wiring on the subscriber side of wherever the demarcation point may be set, there are certainly no rules that provide a mechanism for a cable system ever re-acquiring the wiring. The proverbial concept of the level playing field seems to have been forgotten.

subscriber with all services, present and future. Thus the Commission would permit a competitor to pay six cents a foot, not merely to use wiring on the subscriber's premises, but to foreclose competition and make impossible the provision of other services without the installation of a new distribution system. Under these circumstances, it can be assumed that competitors, armed with pocket change and a bank of telephones will within hours acquire a cable system's distribution facilities while at the same time putting the cable system out of business. Not a bad competitive edge. Not bad for a morning's work. This is the real effect of the Commission's proposal.

An Unconstitutional Taking

8. By moving the demarcation point in an MDU to a place more accessible to competitors, the Commission would be ceding to another part of the cable system's distribution plant. Without the distribution system accessible to the subscriber, the system is foreclosed from offering present and future services. This taking of property would not violate the Fifth Amendment, the Commission argues, because the cable operator would be compensated -- at six cents a foot. CATA respectfully reminds the Commission that the Constitution requires not merely compensation for the taking of property, but just compensation. It might be defensible to call six cents a foot just compensation for wiring within an apartment, because with the distribution plant still in place -- in the hallways and stairwells -- a cable operator can re-wire the apartment easily and cheaply in the future. But if moving the demarcation point means confiscating the cable system's distribution wiring, then there is nothing "just" about compensation of

six cents a foot. In this situation the cable system is not merely deprived of some cable, but foreclosed from doing business at all. Whatever the complexities of arriving at just compensation might be, some effort must be made to account for the impact on one who is losing property. In the case of land, for instance, where most cases have arisen, just compensation is surely a price that exceeds the value of the soil itself! What the Commission is really talking about is depriving one company of the ability to offer services in favor of another. Under these circumstances "just" compensation would presumably reflect the opportunities lost by the one company and gained by the other.

9. In most cases, the concept of "just compensation" is based on market value -- what a willing buyer would pay to a willing seller.[2] Furthermore, in determining fair market value, a court must consider the "highest and best use" of the property. See, e.g., United States v. L.E. Cooke Co., 991 F. 2d 336, 341 (6th Cir. 1993); United States v. Land, 62.50 Acres of Land More or Less, 953 F.2d 886, 890 (5th Cir. 1992).

> In determining fair market value, we must consider "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future . . . to the full extent that the prospect of demand for such use affects the market value which the property is privately held."

Although just compensation does not include future lost profits, the fair market value of property may include an "assessment of the property's capacity to produce future income if a reasonable buyer would consider that capacity in negotiating a fair price for the

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[2] Almota Farmers Elevator & Whse. Co. v. United States, 409 U.S. 470, 474 (1973); Olson v. United States, 292 U.S. 246 (1934),

property." See, e.g., Yancy v. United States, 915 F.2d 1534, at 1542. Moreover, it has been held that a property's potential use can enhance its present market value and that enhanced value is properly considered in determining just compensation. See, e.g., Land, 62.50 Acres, 953 F. 2d at 890; Winooski Hydroelectric Co. V. Five Acres of Land, 769 F.2d 79, 83 (2d. Cir. 1985). It certainly seems reasonable to conclude that any determination of the fair market value of lost cable wiring resulting from an extension of the demarcation point should necessarily include an assessment of lost future income in that moving the demarcation point may severely restrict a company's ability to compete in providing telephony and advanced telecommunications services. Would the result be an amount that a cable competitor (now an agent of the subscriber) would be unwilling to pay? Probably. This is why competitors are unwilling to install wiring themselves and seek the Commission's complicity in taking the cable operator's wiring. But such complicity would result in an unconstitutional taking.

Right Of Access

10. Much of the difficulty giving rise to this proceeding lies in the inability of competing MVPDs to gain access to MDUs, or, if access can be gained, an unwillingness to pay for distribution plant within the building.[3] In some cases, competitors can gain access to the building but are not permitted to duplicate wiring already laid down by a

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[3] We note with amusement the Wireless Cable Association's characterization in MM Docket No. 92-260 of a second cable as a "visual blight." The appearance of a second cable would undoubtedly improve dramatically were its installation less expensive.

cable system. Herein lies the root of the problem and this is where the Commission should direct its efforts.

11. The Commission's analogy to telephone wiring may not be valid. The question is asked whether an individual resident of a building could obtain telephone service over a building owner's objection. Probably not. But in practice, no building owner could attract residents without telephone service, so the problem does not arise. Not so with cable. It is not considered a necessity. Residents of MDUs can and do get by with antennas of one kind or another. Building owners can and do prohibit cable wiring. If there is to be some grand broadband convergence of video services and telephony then the most obvious regulatory gesture would be to ensure that all competitors have access to buildings.

12. As the Commission notes, a number of states have access laws, but most do not. Even where a company can gain access to a building, it is not clear that it can install distribution facilities throughout the building. In some cases, companies contract for the use of MATV wiring. Often, however, this wiring is not able to support the number of channels sought to be delivered. Sitting astride the entire process is the building owner, often with palm extended, acting as gatekeeper for the residents.

13. CATA recommends that before the Commission even considers pre-empting use of cable already installed in MDUs, it should request the Congress to adopt a

uniform federal access law. There can be no serious competition unless all MVPDs have access. Moving the demarcation point is a poor substitute for the right of access and installation of wiring. In the meantime, cable operators should neither apologize nor be penalized for having already wired many MDUs. Certainly, they should not be threatened with having their businesses taken away.

Customer Access To Wiring

14. Although cable systems differ on their policies with respect to permitting customers to install their own cable, or re-arrange installed cable, in practice many subscribers routinely engage in such activity. Homes are constructed "pre-wired" for cable so that all the cable system need do is to attach its cable at a pre-designated, convenient location. Consumers buy converters, A-B switches, RF by-pass devices and the like in the open market and attach these on their premises.

15. While the Commission has no rules requiring operators to permit subscriber access to their cable, drawing an analogy to rules permitting access to telephone wiring is not helpful. The Commission required that access to telephone wiring be permitted in order to encourage a market in CPE equipment, not competition in service. As noted above, there is already a robust market in cable equipment. The Commission notes that a rule permitting access to wiring "may more closely parallel the access telephone customers have to their narrowband inside wiring," but a desire for symmetry is not sufficient reason to adopt rules. Others, it is stated, argue that were there access to the

wiring subscribers might be less likely to "perceive" that it is difficult to change to another broadband service. Given that the Commission has given its blessing for competitors to act as agents for subscribers who wish to switch services, it is hardly likely that subscribers will suffer from mis-perception.

16. Additionally, as the Commission is aware, as a matter of policy, some cable systems do not permit subscriber access to their wiring because of a concern that uncontrolled access might result in cumulative RF leakage for which the system is responsible. Each year systems spend a considerable amount of time, energy and money complying with the Commission's CLI regulations. It is understandable that there might be a reluctance to submit to new difficulties caused by subscribers attempting to cut, replace or move cable even in their own premises. Before attempting new policy in this area the Commission should determine the likelihood of RF leakage that might be caused. This is far more important now since cable operators are about to offer high speed data services which are particularly sensitive to impulse noise migrating into the system from the subscriber premises.

Customer Premises Equipment

17. As discussed above, there is now a thriving consumer market in all devices that might attach to cable wiring with the exception of descramblers. Thus, it seems that in large measure, regulation in this area is unnecessary. As a related matter, however, the Congress, in Section 304 of the Telecommunications Act of 1996 has required the

Commission to assure the availability of equipment used to access services provided by all multichannel video providers. If it is at all necessary to regulate, presumably the Commission should do so in this larger context and not merely devote its attention to cable equipment. Questions of whether there should be different regulations for equipment designed to receive, than for equipment designed to transmit and receive, how to best protect against theft of service, whether equipment used to interact with the switched telephone network requires Part 68 registration or some other program -- all these issues should be deferred to the upcoming proceeding necessary to comply with the Act.

Ownership Of Inside Wiring

18. The Commission also requests comment on whether it can and should require cable operators to sell inside wiring to subscribers and even goes as far as to request comment on whether there should not be a rebuttable or even irrebuttable presumption that the subscriber already owns the wiring.[4] These questions reflect a shocking arrogance. Whatever the Commission's desire might be to engineer the market

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[4] The Commission bases these proposals on the fact that some subscribers do own their wiring and that in some states fixture laws make the wiring the property of the subscriber. But surely, the Commission is aware that in most situations the wiring belongs to the cable operator. The entire concept of having rules to deal with wiring upon termination of service is based on this presumption. That the Commission would even entertain the notion that subscriber ownership of wiring should be an irrebuttable presumption clearly shows the Commission's unseemly predisposition to change the telecommunications structure to fit its own peculiar vision. This seems an example of regulatory activism run amok.

for broadband communications, there is simply no legal or economic justification for these proposals. The Congress gave the Commission authority to regulate the disposition of inside wiring in the narrow circumstance where a subscriber voluntarily terminates service. It did not give the Commission authority to create regulations designed to promote termination, or to create new property rights. It did not authorize a giveaway program. The Commission has no more authority to give away a cable system's inside wiring than it does to give away the system's distribution plant or headend facilities. That doing so might, in the Commission's view, promote some concept of competition is quite beside the point. The Commission is not free to play fast and loose with a system's property merely because it may have some premature view of the future or preference for what it should be.

19. There is clearly no legal justification for the Commission's overreaching proposals; neither is there a problem crying out for resolution. Obviously, those who wish to compete with cable systems would, in the best of all worlds, prefer to compete at no cost. It is surprising however, that their understandable desire to invest little and earn much resonates so powerfully with the Commission. In fact, even before the Telecommunications Act of 1996, competition was rapidly growing. Now the Congress has taken specific steps to encourage and permit broadband competition. There is no indication that competition will not continue to grow. There is certainly no record to support such a proposition. The Commission cannot, simply by asking a multiplicity of questions create such a record. This, once again, raises the underlying issue of the very

nature of this proceeding. To suggest, and indeed label it as a "rulemaking," when no specific rules are drafted and distributed for comment and perfection (the very purpose of a Rulemaking, according to the wisdom of the Administrative Procedure Act) does a disservice to both the Commission and the public. The Commission has neither the record to adopt the policy it is suggesting, nor has it drafted operable rules that would avoid the many legal challenges that would inevitably follow.

Conclusion

20. The cable industry does not fear multichannel video competition. It welcomes such competition and will undoubtedly rise to the challenge and provide even better service to its millions of subscribers. This, indeed, is happening right now without any new impositions, mandates, clarifications, reconsiderations or the like from the Commission. At issue, however, is the notion that the way to achieve more competition is at the expense of the cable industry. Over a fifty year period the cable industry has invested billions of dollars in building the physical facilities necessary to serve what is now more than 66 million customers. These facilities were designed, intentionally, to be flexible and capable of providing a multiplicity of telecommunications services. That the century-old telephone infrastructure, designed solely for narrowband purposes, is regulated by the Commission in a particular fashion has no real relevance, nor should it create any presumption when dealing with a new telecommunications infrastructure regardless of who has constructed it. Cable television facilities are NOT just designed for the provision of television. Equating "competition" with the ability of a current

hopeful "competitor" to use the cable-installed plant for the purpose of delivering an "alternative" video service is an extremely myopic view of competition in the new world of broadband telecommunications. As already mentioned, Congress clearly has a far more expansive view of what it seeks in the new competitive environment than the Commission suggests in this proceeding. Unbidden by Congress, the Commission now seems prepared to confiscate cable facilities so that others may use them to deliver video services even though this means that cable operators will no longer be able to provide other competitive services. Such regulation would go beyond anything the Commission has ever done. Whatever current regulations require telephone companies to permit access to narrow-band facilities, the result does no more than permit telephone competition. It does not deprive telephone companies of the physical ability to do business. The technologies are vastly different. It is a fundamental error for the Commission to suggest equating the regulation of telephone and cable plants simply because both have the capability of providing some similar services.

21. CATA strongly objects to Commission proposals that would, by moving the demarcation point from a subscriber's premises, deprive cable operators of the physical ability to do business. To do so is not envisioned by either the Cable Act of 1992 or the Telecommunications Act of 1996. Moreover, such action would constitute an unconstitutional taking under the Fifth Amendment. CATA also objects to any proposal that would simply define cable facilities as already owned by another. The Commission cannot escape the constitutional infirmity of providing inadequate compensation for

cable facilities merely by stating that those facilities do not belong to the cable operator in the first place.

22. CATA supports laws that would remove the gatekeeper function of building owners by providing uniform access to buildings for all broadband services. The Commission should seek authority from the Congress to impose such regulations. The result would be real competition in broadband service, not the illusory competition proposed by the Commission where a consumer would have a choice of only one service provider. The Commission should seek to remove barriers to competition, not competitors.

Respectfully submitted,

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